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76-6769

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. A-739

LEROY BATES, Petitioner

v.

STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

RICHARD M. MOSK
MARILYN EPSTEIN LEVINE
1800 Century Park East
Los Angeles, California 90067

JACK GREENBERG
JAMES M. NABRIT, III
PEGGY C. DAVIS
JOEL BERGER
DAVID E. KENDALL
10 Columbus Circle, Suite 2030
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

ATTORNEYS FOR PETITIONER

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ERRATA SHEET TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

P. iv, line 10: omit n. 9

P. 7, line 2, should read: "There was no evidence that either of the men had said anything which amounted to a demand for money."

P. 7, line 23: "petitioner's" instead of "defendant's"

P. 9, line 11: add "a" before "jury"

P. 10, footnote 3, line 28: "unnecessary" spelled the correct way

P. 10, footnote 3, line 31: "Proffitt" instead of "Proffit"

P. 14, line 7: State Supreme Court

P. 25, line 8: "." instead of "," after "counsel"

P. 28, line 32: add "that" at end of line

P. 30, line 7: "petitioner's" instead of "defendant's"

P. 34, line 32: "n.2" instead of "n.1"

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MARILYN EPSTEIN LEVINE
1800 Century Park East
Los Angeles, California 90067

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ATTORNEYS FOR PETITIONER

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OF THE STATE OF OHIO

Petitioner, LEROY BATES, respectfully prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Ohio in this proceeding dated December 23, 1976.

I. OPINIONS BELOW

The opinions of the Supreme Court of the State of Ohio, reported as State v. Bates at 48 Ohio St. 2d 315, 358 N.E. 2d 584 (1976), and the Court of Appeals, First Appellate District, Hamilton County, Ohio, are attached hereto as Appendices I and II, respectively.

II. JURISDICTION

The jurisdiction of this court is invoked pursuant to Title 28 U.S.C., Section 1257(3).

III. QUESTIONS PRESENTED

A. Does the imposition of the death penalty upon one who merely participated in an attempted robbery in which someone was killed but who did not kill anyone and who did not authorize his accomplice to carry a loaded weapon constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and a denial of due process in violation of the Fourteenth Amendment to the United States Constitution?

B. Does the imposition of the death penalty under the Ohio capital punishment statute violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because:

1. The Ohio statute circumscribes consideration of mitigating factors;

2. The burden of proof of mitigating factors is placed upon the defendant;

3. The jury is excluded from the sentencing process;

4. The Ohio death penalty statute penalizes a defendant who exercises his right to a jury trial to determine his guilt or innocence; and

5. The review of capital cases by the Ohio Supreme Court is inadequate?

C. Does admission of petitioner's confession at trial require reversal of his conviction because:

1. The confession was obtained after petitioner requested and was denied counsel;

2. The confession was obtained after petitioner indicated that he desired to remain silent;

3. The circumstances demonstrate that petitioner did not knowingly and intelligently waive his constitutional rights to counsel and to remain silent and that the confession was not voluntary; and

4. The erroneous admission of the confession was prejudicial even though petitioner's testimony reiterated much of the content of his confession since there was no showing that his testimony was not impelled by his extra-judicial confession?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

2. This case also involves the following sections of the Ohio Revised Code (hereinafter "R.C."), all of which sections are set forth in full in Appendix III hereto: §§ 2903.01, 2911.01, 2929.02-2929.04.

V. STATEMENT OF PROCEEDINGS BELOW

On January 24, 1975, the Hamilton County, Ohio, Grand Jury returned a two-count indictment charging defendant-petitioner Leroy Bates (referred to herein as "petitioner" or "Bates") and Ellis Shelton with causing the death of Lloyd Adkins while attempting to commit aggravated robbery and with attempted aggravated robbery. Bates entered a plea of not guilty.

In March, 1975, the trial court, after a hearing, denied petitioner Bates' motion to suppress a confession. (Transcript of Motion to Suppress Hearing [hereafter referred to as "TM"] 198).

Bates and Ellis Shelton were tried in separate trials. Following a trial in the Court of Common Pleas of Hamilton County Ohio (Transcript of Proceedings [hereinafter referred to as "TP"]), the jury found Bates guilty of both counts. After a "mitigating hearing" before the trial judge without a jury, the trial judge found that Bates had failed to sustain his burden to show by a preponderance of the evidence the existence of one of the statutory mitigating circumstances. Accordingly, on June 30, 1975, the court sentenced Bates to death by electric chair on one count and to confinement for a period of seven to twenty-five years on the other count. (Transcript of Mitigating Hearing and Sentencing [hereafter referred to as "TS"] 33.)

Bates' conviction and sentence were affirmed by the Court of Appeals, First Appellate District, Hamilton County, Ohio, and by the Ohio Supreme Court. (State v. Bates, 48 Ohio St. 315, 358 N.E. 2d 584 (1976).)[1/] Bates is presently in custody.

1/ In this case, the Ohio appellate courts considered the admissibility of Bates' confession and the sufficiency of the evidence to sustain the death penalty, but did not expressly consider the constitutionality of the Ohio capital punishment statute. On November 24, 1976, however, the Ohio Supreme Court had upheld the constitutionality of its capital punishment statute. State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976). The court stated in that case that in reviewing any death penalties, it has the responsibility to assure that they "are not imposed arbitrarily and capriciously" and that any such sentence is "fairly imposed by Ohio's trial judge." State v. Bayless, supra, 357 N.E. 2d at 1045. Accordingly, in the instant case, it must be assumed that the Ohio court approved the constitutionality of the death penalty statute. See Boykin v. Alabama, 395 U.S. 238, 241 (1969).

Moreover, this Court will consider issues involving "plain error" even though not specifically raised before the Court or in the state courts. Vachon v. New Hampshire, 414 U.S. 478, 479 n. 3 (1974).

The Ohio Supreme Court has stayed the execution of sentence until a final determination by the United States Supreme Court. The Supreme Court extended the time to file a petition for writ of certiorari until May 22, 1977.

VI. STATEMENT OF FACTS

This case involves the imposition of the death penalty upon a mentally retarded young man who did not kill anyone. At the time of the crime, defendant was 18 years old, with minimal education, under the influence of drugs and alcohol, and only reluctantly involved at the insistence of an older man (the one who, according to the prosecution, actually committed the killing). The supreme penalty is being assessed under a statute which petitioner claims contains a number of defects of constitutional magnitude, and by virtue of the vicarious liability and felony-murder doctrines.

On November 25, 1974, Leroy Bates, then 18 years old, was staying with his sister and had been consuming alcohol and drugs. Also present was a 39-year old man, Ellis Shelton, who suggested engaging in a robbery and who asked Bates to obtain a gun. (TP 280-285.)

Bates called Kenneth Carter and arranged to obtain a shotgun for $20. While Bates was sleeping, Shelton obtained the weapon from Carter (TP 7, 16-18, 285-287.) Shelton urged Bates

to accompany him on a robbery, assuring him that the shotgun would not be loaded. After at first refusing to engage in the robbery, Bates finally acceded to Shelton's requests. (TP 287-290, 292.)

At approximately 12:20 A.M., Tuesday morning, November 26, 1974, two men entered the Warner Tavern, located at 303 Warner Street, City of Cincinnati, Hamilton County, Ohio. There were three people already in the cafe: the owner, Lois Wells, who was standing behind the bar; Robert Schultheis, a patron and friend of Mrs. Wells, who was seated at the open end of the bar reading a newspaper; and Lloyd Adkins, an off-duty Pinkerton guard who was seated on the second stool from the end of the bar and nearest to the entrance to the tavern from Warner Street.

The two men who entered the tavern wore stocking masks. The taller of the two was carrying a sawed-off single barrel, single shot, Springfield 12-gauge shotgun. The shorter man, later purportedly identified by Lois Wells as Bates,[2/] went to the end of the bar where Mr. Schultheis was seated and became involved in an altercation with him. At the same time, Lloyd Adkins stood, said, "Oh no, you don't," and grabbed the shotgun in the hands of the taller man. Adkins and the taller man struggled over possession of the gun, which struggle resulted in a single shot being fired that struck Adkins in the chest and killed him. Both masked men fled the tavern, having obtained no

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2/ The two men wore masks. (TP 43.) Mrs. Wells was near-sighted (TP 59.), and prior to trial she was shown a picture of Bates. Also, prior to trial she said she could only identify the build of the suspect. (TP 58.)

property or thing of value. (TP 32-37, 42-52, 63-82, 290-292.) There was no evidence that either of the men had said anything.

On November 27, 1974 and November 30, 1974, various portions of the shotgun which allegedly caused the death of the victim were found. (TP 98-99, 135.)

According to Mr. Carter, Bates called him and asked him to come and get the shotgun; Bates also told him that Ellis Shelton had shot a man with it during a robbery in which they were involved. (TP 19-21.)

On December 12, 1974, in the afternoon, the police arrested Bates at his sister's house and took him to the police station. They purportedly read him his constitutional rights (TP 170), questioned him, interrupting him frequently, and obtained a recorded confession, which was later played for the jury at trial. (TP 177-80.)

At a pre-trial hearing on a motion to suppress the confession, Bates and his brother testified that at the time of Bates' arrest and interrogation, Bates was under the influence of drugs and alcohol. There was evidence of defendant's mental retardation. (TM Bates 5-8, 13-15, 18, 20, 23-24, 26-29, 33-35, 40; Frank Bates 17-18, 26-32; Dr. Hottenstein 4-13 and Dr. Haskell 19-35.)

Bates also testified that prior to his confession he requested an attorney, which request was denied, and that despite his requests for an attorney and to remain silent, the interrogation continued. (TM Bates 13, 14, 20, 27-28.)

Bates testified that he was promised a lesser charge for his cooperation. (TM Bates 18-25.) Bates asserted that he believed trickery was being used by the officers. (TM Frank Bates 15.) His brother, Frank Bates, corroborated his testimony since he, Frank Bates, overheard much of the interrogation. (TM Frank Bates 11-16.)

The interrogating police officers testified that they did not believe Bates was under the influence of drugs or alcohol during the interrogation, although there was no evidence contradicting evidence of petitioner's mental retardation. The officers denied promising Bates a lesser charge in return for a confession, but conceded that they had discussed with him lesser charges, including manslaughter. One of the officers also admitted, in effect, that Bates was lead to believe he would not be charged with first degree murder. The officers did not rebut the charge that Bates was denied an attorney before his confession, despite his request for one, and that the interrogation did not cease after he stated he wished to remain silent. (TM Drescher 129-162 and Burgess 163-189.) One officer candidly admitted that at the time of the confession Bates "was in a right mental state at that time for a recorded statement to be taken." (TM Drescher 152-153.) The interrogation prior to the statement lasted three and one-half hours (TP 182.)

The trial court denied the motion by Bates to suppress the confession. The court did not discuss the fact that Bates' requests for counsel and to remain silent had been ignored, but merely concluded that the confession was voluntary and that Bates had been advised of his rights. There was no finding as to a waiver of constitutional rights. (TM 197-198.) The issue as to the admissibility of the confession was never presented to the

jury. Although petitioner's testimony at trial included much of the material in the confession, there was no evidence that the testimony was not induced by the fact that a recorded confession had already been admitted into evidence.

After the trial, the jury found Bates guilty of aggravated murder while attempting to commit aggravated robbery and of attempted aggravated robbery.

After conviction, a so-called mitigation hearing was held before the judge sitting without jury. At that hearing, there was uncontradicted evidence that Bates was a mentally retarded, emotionally unstable 18-year old, that he was under the influence of drugs and alcohol at the time of the crime, and that he was talked into engaging in the robbery by a 39-year old man who assured him that there would be no loaded weapon. The evidence disclosed that the gun was held by the older man and discharged when the victim grabbed it. The prosecution did not contradict the evidence that the victim was not shot by Bates. (TS 2-19.)

Despite this evidence, the judge found that petitioner had not sustained his burden to show one of the three available mitigating circumstances, which are inducement by the victim; duress, coercion or strong provacation; and that the offense was the product of psychosis or mental deficiency not amounting to legal insanity. (TS 31-32.)

Accordingly, the court was required by law to and did impose the death penalty. (TS 33.)

Bates appealed, setting forth a number of alleged errors that took place at trial. The conviction and death sentence were

affirmed by an Ohio intermediate appellate court and the State Supreme Court.

VII. REASONS FOR GRANTING THE WRIT

A. THE IMPOSITION OF THE DEATH PENALTY UPON ONE WHO MERELY PARTICIPATED IN AN ATTEMPTED ROBBERY IN WHICH SOMEONE WAS KILLED BUT WHO DID NOT KILL ANYONE AND WHO DID NOT AUTHORIZE HIS ACCOMPLICE TO CARRY A LOADED WEAPON CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND A DENIAL OF DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court, in holding the death penalty constitutional, has done so only ". . .for the crime of murder, and when life has been taken deliberately by the offender. . ." Gregg v. Georgia, 428 U.S. 153 (1976). The Court has reserved the question of the constitutionality of the imposition of the death sentence upon a person who has not killed, but whose accomplice in an otherwise non-capital offense has killed someone. Woodson v. North Carolina, 428 U.S. 280, 305 n. 40, (1976).[3/]

The instant case squarely presents this issue left unresolved by the Court, for Bates did not kill the victim. The ultimate sentence is being imposed upon Bates, not because he intended to kill or did kill, but solely because of another

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3/ "Our determination that the death sentences in this case were imposed under procedures that violated constitutional standards makes it unnecssary to reach the question whether imposition of the death penalty on petitioner Woodson would have been so disproportionate in comparison with the nature of his involvement in the capital offense as independently to violate the Eighth and Fourteenth Amendments." Woodson was convicted of first degree murder, although apparently his accomplice did the killing. References to Gregg, Woodson and to Proffit v. Florida, 428 U.S. 242 (1976), Jurek v. Texas, 428 U.S. 262 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976) shall be to the plurality opinions therein.

person's intent and acts. The facts of the instant case are particularly compelling because it is uncontradicted that Bates had the assurance of his accomplice that the latter's gun was unloaded. (T.P. 287-289, 292.)

This Court has declared that an essential issue with respect to the constitutionality of the death penalty is "whether the punishment of death is disproportionate in relation to the crime for which it is imposed." Gregg v. Georgia, supra, 428 U.S. at 187.

In the instant case the death penalty is being assessed upon a person who merely engaged in what he thought was a robbery without a loaded weapon.[4/]

Two legal principles were applied in order to attribute to Bates the requisite intent and acts for first degree murder. First, he was held accountable for the unauthorized acts of his alleged accomplice. The application of the doctrine of vicarious liability in this context has long been criticized as contrary to fundamental doctrines of criminal law. See Sayre, "Criminal Responsibility for the Acts of Another", 43 Harv. L. Rev. 689, 717 (1930).

Second, the requisite intent and the act of killing were attributed to Bates by virtue of the felony-murder doctrine, which doctrine has been criticized because it "erodes the relation between criminal liability and moral culpability."

4/ Ohio does not impose the death penalty for rape, kidnapping or armed robbery. R.C. §§ 2907.02; 2905.01, 2911.01, 2929.11.

People v. Washington, 62 Cal. 2d 777, 783, 402 P.2d 130, 134 (1965) (Traynor, J.).

In addition, to inflict the death penalty, not on the basis of the acts and intentions of the defendant, but rather on the fortuitous circumstances of his accomplice's actions leads to results just as arbitrary as those condemned in Furman v. Georgia, 408 U.S. 238 (1972).

Accordingly, the Court should grant certiorari to resolve the question it left open in Gregg and Woodson as to whether the death penalty can be imposed constitutionally upon one who does not kill during a robbery.

Moreover, the Court should determine whether the death penalty can be imposed constitutionally upon one who did not kill during a robbery, who was not armed, and who received assurances from his accomplice that the accomplice was not armed with a lethal weapon.

B. THE IMPOSITION OF THE DEATH PENALTY UNDER THE OHIO CAPITAL PUNISHMENT STATUTE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BECAUSE:

1. THE OHIO STATUTE UNCONSTITUTIONALLY CIRCUMSCRIBES CONSIDERATION OF MITIGATING FACTORS;

2. THE BURDEN OF PROOF OF MITIGATING FACTORS IS UNCONSTITUTIONALLY PLACED UPON THE DEFENDANT;

3. THE EXCLUSION OF THE JURY FROM THE SENTENCING PROCESS IS UNCONSTITUTIONAL;

4. THE OHIO DEATH PENALTY STATUTE PENALIZES A DEFENDANT WHO EXERCISES HIS RIGHT TO A JURY TRIAL TO DETERMINE HIS GUILT OR INNOCENCE; AND

5. THE REVIEW OF CAPITAL CASES BY THE OHIO SUPREME COURT IS CONSTITUTIONALLY INADEQUATE.

In Ohio, the death penalty is mandatory after conviction of a capital offense[5/] unless, at a special post-trial, non-jury hearing, the defendant can establish by a preponderance of the evidence one of three mitigating circumstances -- inducement by the victim; duress, coercion or strong provocation; or psychosis or mental deficiency not amounting to legal insanity. R.C. §2929.04 (B).

5/ An offense is a capital offense if the prosecution proves two elements: (1) "aggravated murder," which is the equivalent of "premeditated" or first degree murder (Page's Ohio Rev. Code Annot. §2903.01, Committee Comment); and (2) one of seven aggravating circumstances, including assassination of certain public officials, murder for hire, murder to escape accountability for another crime, murder by a prisoner, repeat murder or murder of more than one, killing a law enforcement officer and felony murder. R.C. §2929.04.

The defendant charged with a capital offense may waive his right to a jury trial, in which case a three-judge court makes both the guilt and sentencing determinations. R.C. §2929.03(C).

The defendant sentenced to death has the right to review in the intermediate appellate court and, if the sentence is affirmed, in the state supreme court. The statute does not define the scope of review.

Each of the provisions of the Ohio law raises serious constitutional questions. It is important for this court to resolve these issues, not only because the life of Mr. Bates is at stake, but to provide further guidance to various jurisdictions that have enacted or are enacting death penalty laws.

1. The Ohio Statute Unconstitutionally Circumscribes Consideration of Mitigating Factors.

Under the Ohio capital punishment statute, the death penalty is mandatory for a defendant convicted of a capital offense unless he can establish one of three mitigating circumstances, which circumstances are so narrowly defined and applied as to be, in effect, virtually inapplicable. Accordingly, the Ohio statute omits factors which are constitutionally required to be considered in connection with the imposition of the death sentence.

This Court has held that the Eighth Amendment "requires consideration of the character and record of the individual offender and of the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting

the penalty of death." Woodson v. North Carolina, supra, 428 U.S. at 304. The three death penalty statutes which this Court has found constitutional permit the sentencing authority to consider a wide or unlimited range of mitigating factors. See Gregg v. Georgia, supra, 428 U.S. at 164 (Georgia statute permits consideration of "'any mitigating circumstances. . . otherwise authorized by law'"); Proffitt v. Florida, 428 U.S. 242, 252 (1976) (seven statutory mitigating circumstances, including the role of the defendant in the crime, his age and his mental condition; ". . .[t]he sentencing judge must focus on the individual circumstances of each homicide and each defendant."); Jurek v. Texas, 428 U.S. 262, 273 (1976) (". . . the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it.").

In marked contrast, the Ohio capital punishment statute permits consideration of only three very narrow mitigating circumstances, omitting entirely factors of great importance. For example, one of the "circumstances of the particular offense" which is a "constitutionally indispensible part of the process of inflicting the penalty of death" (Woodson v. North Carolina, supra, 428 U.S. at 304) is the extent of the defendant's participation in the crime (a factor particularly relevant to the instant case).

Despite the mandate of this Court that a capital sentencing procedure must "focus on the circumstances of the particular offense and the character and propensities of the offender," Roberts v. Louisiana, 428 U.S. 325, 333 (1976), under Ohio law, Bates may be put to death with no such focus on his role in the crime of which he was convicted or of his particular character and propensities.

The facts that Bates did not kill anyone and believed his alleged accomplice's weapon was unloaded must be considered in connection with mitigation. Yet, by virtue of the Ohio statute, those compelling factors were irrelevant. Likewise, since the court found that Bates had not sustained his burden to establish the three mitigating factors, his age and mental condition were apparently also irrelevant.

The three mitigating circumstances are so narrow as to be illusory, thus in effect rendering the death penalty virtually mandatory.

The first such mitigating factor is that the victim of the offense induced or facilitated it. R.C. §2929.04(B)(1). While no reported case discusses this factor, it appears on its face to be limited to mercy-killing and will thus seldom if ever be relevant in a capital case.[6/]

The second mitigating factor is that "it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation." R.C. §2929.04(B)(2). Under many circumstances, these factors may be exculpatory. Duress or coercion is often a defense to a crime, and strong provocation leads to the reduction of the degree of homicide. E.g., R.C. §2903.03. The application of these narrow principles at a mitigation hearing after a conviction for first degree murder is necessarily limited.

6/ In the instant case, the trial judge considered irrelevant the fact that the victim grabbed for the weapon, resulting in its discharge and his death. (TS 24, 31.)

The third mitigating factor is that the offense "was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." R.C. §2929.04(B)(3).

If the offense was the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity, then by virtue of the diminished capacity doctrine, the offender most likely lacked the capacity to deliberate or premediate or have the requisite intent for aggravated murder. Instead he would be guilty of second degree murder or manslaughter. See State v. Nichols, 3 Ohio App. 2d 182, 209 N.E. 2d 750, 755 (1965).

Moreover, if the offense "was primarily the product of the offender's psychosis or mental deficiency," then the defendant should have a defense to the crime, for such a test is basically indistinguishable in purpose and effect from the American Law Institute test for the defense of insanity, which is utilized in Ohio.[7/]

Since psychosis or mental deficiency will normally constitute a defense to the crime (either an absolute defense or to reduce the degree), a defendant's mental state will rarely be applied as a mitigating factor under the Ohio test.

7/ State v. Staten, 18 Ohio St. 2d 14, 247 N.E. 2d 293, 299 (1969). The "product" test, established as the insanity defense in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), was abondoned in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) in favor of what is essentially the American Law Institute test, not because the tests are substantively different or lead to different results, but because the court believed the ALI test provided for a preferable evidentiary presentation. The court indicated that the Durham rule and the ALI test have the same basic objectives and same basic results. 471 F.2d at 989.

The Ohio Supreme Court has compounded the confusion with regard to this mitigating factor by refusing to define "psychosis or mental deficiency," on the ground that "to define such terms is to narrow them." State v. Black, 48 Ohio St. 2d 262, 268, 358 N.E. 2d 551, 556 (1976). Thus, the court has made this mitigating factor impossible to apply rationally or even-handedly.

In sum, the Ohio statute on its face unconstitutionally limits the sentencing authority's consideration of mitigating factors which are "a constitutionally indispensible part of the process of inflicting the penalty of death." Woodson v. North Carolina, supra, 428 U.S. at 304. The statute provides a virtual mandatory death penalty on its face and as applied, in violation of the Eighth Amendment. Cf. Roberts v. Louisiana, supra, 428 U.S. 325.

2. The Burden of Proof of Mitigating Factors is Unconstitutionally Placed Upon the Defendant.

The Ohio capital punishment statute requires the defendant to establish by a preponderance of the evidence one or more of the mitigating factors. R.C. §§2929.03(E), 2929.04(B). By so doing, this scheme deprives defendants of their life without due process of law.

Due process requires the prosecution in a criminal case to prove beyond a reasonable doubt every essential element of guilt. In re Winship, 397 U.S. 358, 364 (1970). While mitigation is technically relevant not to "guilt" but only to punishment,

that technicality cannot justify eliminating a procedural safeguard as basic as the burden of proof in a criminal case. In fact, mitigation is undeniably relevant to the question of whether the defendant is guilty of capital murder, the crime for which he will be punished.

Even assuming that mitigation is relevant only to punishment, the Ohio statute is nevertheless constitutionally defective. In Mullaney v. Wilbur, 421 U.S. 684 (1975), this Court invalidated a Maine procedure which placed upon the defendant the burden of proving by a preponderance of evidence the existence of provocation to reduce a murder offense to manslaughter. Although under Maine law, provocation was not labelled as an element of the crime of murder, a finding of provocation resulted in a substantial reduction in penalty. The Court held that the drastic effect upon extent of punishment prohibited placing the burden of proof as to provocation upon the defendant.

In view of Mullaney and the fact that this Court has recognized the qualitative difference between a death sentence and any sentence of imprisonment (Woodson v. North Carolina, supra, 428 U.S. at 303-4), Ohio's allocation of the burden of proof with respect to the determination of the facts supporting mitigation violates Bates' constitutional rights.

3. The Exclusion of the Jury From the Sentencing Process is Unconstitutional.

The Ohio statutory scheme does not permit any jury participation in the sentencing process. Although this Court "has never suggested that jury sentencing is constitutionally required" (Proffitt v. Florida, supra, 428 U.S. at 252), it has

neither considered nor approved any death penalty statute which totally excludes the jury from factual resolutions which determine the ultimate sanction. The Florida law upheld by this Court in Proffitt provides an advisory jury for sentencing; the advisory jury sentence may be mitigated by the judge and can be increased only where a life sentence would clearly be unreasonable; and the sentencing judge must make findings, thus permitting meaningful appellate review. The Ohio statute does not include any of these safeguards.

The Eighth Amendment requires that the death penalty be imposed only under circumstances which assure that it is in conformity with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1968). This Court has recognized that the "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society" are "jury determinations and legislative enactments." Woodson v. North Carolina, supra, 428 U.S. at 293 (emphasis added).[8] This Court has also noted with respect to the death penalty that the jury "is a significant and reliable objective index of contemporary values because it is so directly involved." Gregg v. Georgia, supra, 428 U.S. at 181. The Ohio Legislature, however, has totally excluded the jury from the capital sentencing process, rendering the death sentences imposed in Ohio cruel and unusual punishment.

The elimination of the jury in connection with fact-finding also deprives a defendant of his constitutional right to

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8/ This Court has also observed that "one of the most important functions any jury can perform. . .is to maintain a link between contemporary community values and the penal system" necessary to assure that conformity with standards of decency. Witherspoon v. Illinois, 391 U.S. 510, 520 n. 15 (1968).

a jury trial. Although mitigating factors are technically relevant not to guilt but to punishment, Mullaney v. Wilbur, supra, 421 U.S. 684, stands for the proposition that where the determination of certain facts is of significance, the state may not eliminate procedural safeguards in connection with their proof by simply "characterizing them as factors that bear solely on the extent of punishment." Id. at 698; accord United States v. Kramer, 289 F.2d 909, 921 (2d Cir. 1961). Here, the factual determination is literally a matter of life and death. The total preclusion of the jury from that determination violates a defendant's constitutional right to a jury trial.

Accordingly the Ohio statute raises serious Sixth and Eighth Amendment problems which require resolution by this Court.

4. The Ohio Death Penalty Statute Penalizes a Defendant Who Exercises His Right To A Jury Trial To Determine His Guilt or Innocence.

The Ohio capital punishment statute in effect restricts a defendant's right to a jury trial even on the question of guilt. If a defendant waives a jury trial in favor of trial by a three-judge panel, he is sentenced, not by one judge, but by the same three-judge panel; in that case, he need only convince one judge out of the three of the existence of a mitigating circumstance, (R.C. §2929.03(C), (E)) and his chances of avoiding a death sentence are thereby increased.

A statutory scheme which dilutes the right to trial by jury cannot constitutionally be tolerated. This Court has held that a statute which allows the death penalty in kidnapping cases

where trial is by jury but not where trial is by the court violates a defendant's constitutional right to a jury trial. United States v. Jackson, 390 U.S. 570, 583 (1968). The Ohio statute is likewise unconstitutional on its face because it inhibits and threatens a defendant's Sixth Amendment right to a jury trial.

Moreover, in this case, Bates did not obtain the benefit of a three-judge sentencing court - an advantage accorded those who waive their jury trial. Accordingly, not only was his right to a jury trial conditioned upon his giving up certain protections, but he was denied the equal protection of the laws.

5. The Review of Capital Cases By The Ohio Supreme Court is Constitutionally Inadequate.

Plenary review of death sentences by a court of state-wide jurisdiction is an important procedural safeguard against arbitrary and capricious imposition of the death penalty, because it helps to assure that the sentence is not only in conformity with the facts of the case, but is also in conformity with sentences imposed in other similar cases. Gregg v. Georgia, supra, 428 U.S. at 211-212 (concurring opinion).

The Ohio statute gives no guidance to the courts as to the review of capital cases. The record of the Ohio Supreme Court indicates that it has not accorded to capital cases the scrupulous review required by the Eighth Amendment.

The Ohio Supreme Court's decision in the instant case is illustrative of its method of review. Bates raised serious question with respect to proof of mitigating factors. His claim was dismissed by the court with the brief statement that "in the

face of the record, this ruling of the trial court and its affirmance by the Court of Appeals is totally justified." State v. Bates, 48 Ohio St. 2d 315, 358 N.E. 2d 584, 590 (1976).

Moreover, the Ohio Supreme Court has explicitly stated that in capital cases "this court will not retry issues of fact relating to mitigation. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered." State v. Edwards, 48 Ohio St. 2d 31, 47, 358 N.E. 2d 1051 (1976). The "substantial evidence" test in Ohio is very narrow: the sentence will be sustained under the test unless no reasonable mind could reach the same conclusion. State v. Cliff, 19 Ohio St. 2d 31, 249 N.E. 2d 823 (1969). Such a narrow scope of review is patently insufficient in a capital case, particularly since, under the Ohio statutory scheme, the burden of proving mitigation is on the defendant.

As of March 31, 1977, the Ohio Supreme Court had reviewed twenty capital cases under the current law. It affirmed nineteen of the twenty,[9] setting aside one for evidentiary error unrelated to the sentence.[10] This record is in marked contrast

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9/ In order of decision, the cases are State v. Bayless, 48 Ohio St. 2d 73, 357 N.E. 2d 1035 (1976); State v. Strodes, 48 Ohio St. 2d 113, 357 N.E. 2d 375 (1976); State v. Woods, 48 Ohio St. 2d 127, 357 N.E. 2d 1059 (1976) (two cases); State v. Hancock, 48 Ohio St. 2d 147, 358 N.E. 2d 273 (1976); State v. Roberts, 48 Ohio St. 2d 211, 358 N.E. 2d 530 (1976); State v. Black, 48 Ohio St. 2d 262, 358 N.E. 2d 551 (1976); State v. Bell, 48 Ohio St. 2d 270, 358 N.E. 2d 556 (1976); State v. Bates, 48 Ohio St. 2d 315, 358 N.E. 2d 504 (1976); State v. Hall, 48 Ohio St. 2d 325, 358 N.E. 2d 590 (1976); State v. Harris, 48 Ohio St. 2d 351, 359 N.E. 2d 67 (1976); State v. Royster, 48 Ohio St. 2d 351, 358 N.E. 2d 616 (1976); State v. Lytle, 48 Ohio St. 2d 391, 358 N.E. 2d 623 (1976); State v. Perryman, 49 Ohio St. 2d 14, 358 N.E. 2d 1040 (1976); State v. Edwards, 49 Ohio St. 2d 31, 358 N.E. 2d 1051 (1976); State v. Sandra Lockett, 49 Ohio St. 2d 48, 358 N.E. 2d 1062 (1976); State v. Lane, 49 Ohio St. 2d 77, 358 N.E. 2d 1081 (1976); State v. Osborne, 49 Ohio St. 2d 135, 359 N.E. 2d 78 (1976); State v. Miller, 49 Ohio St. 2d 198, ___ N.E. 2d ___ (1977).

10/ State v. James Lockett, 49 Ohio St. 2d 71, 358 N.E. 2d 1077 (1976).

to the record of the Florida Supreme Court, which had set aside the death sentences in eight out of twenty-one cases as of the time of this Court's decision in Proffitt v. Florida, supra, 428 U.S. at 253. Ohio's unstructured and insufficient appellate review thus raises serious questions as to the constitutionality of the statute.

C. THE ADMISSION OF PETITIONER'S CONFESSION AT TRIAL REQUIRES REVERSAL OF HIS CONVICTION BECAUSE:

1. THE CONFESSION WAS OBTAINED AFTER PETITIONER REQUESTED AND WAS DENIED COUNSEL;

2. THE CONFESSION WAS OBTAINED AFTER PETITIONER INDICATED THAT HE DESIRED TO REMAIN SILENT;

3. THE CIRCUMSTANCES DEMONSTRATE THAT DEFENDANT DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND TO REMAIN SILENT AND THAT THE CONFESSION WAS NOT VOLUNTARY; AND

4. THE ERRONEOUS ADMISSION OF THE CONFESSION WAS PREJUDICIAL EVEN THOUGH PEITITIONER'S TESTIMONY REITERATED MUCH OF THE CONTENT OF HIS CONFESSION SINCE THERE WAS NO SHOWING THAT HIS TESTIMONY WAS NOT IMPELLED BY HIS EXTRAJUDICIAL CONFESSION.

This Court should grant certiorari to review various significant constitutional issues concerning the admission of petitioner's confession at trial, not only to resolve those issues,

but also to determine if a man is being sentenced to die when an error of constitutional dimension took place during the preceedings below.

First, the Court should determine whether under Michigan v. Mosley, 423 U.S. 96 (1975) or any other cases, an interrogation can proceed after a defendant has requested and been denied counsel, Second, the Court should determine whether Michigan v. Mosley can be extended to the facts of this case to permit interrogation after the defendant has requested to remain silent. Third, the Court should determine whether under the facts of this case, the prosecution established by a preponderance of the evidence that a waiver of constitutional rights was knowing and intelligent and that the confession was voluntary. Fourth, the Court should determine whether the testimonial confession by itself renders the improper admission of a confession harmless error.

After an interrogation, the police obtained a recorded confession from Bates, which the court refused to suppress and which was played to the jury. (TM; TP 177-78). No instruction regarding the admissibility of the confession was presented to the jury. The statement was particularly damaging for it constituted a full confession, was used to impeach Bates' testimony at trial (TP 313-318) and was undoubtedly before the judge in connection with the mitigation hearing.

At the time of his arrest and interrogation, Bates was 18 years old. He had an I.Q. of 87, which was described as "in the category of mental retardation." (TM Def's Exh. 2; TS Pre-Sentence Invest. Report p. 10). He was under the influence of drugs and alcohol. (TM Bates 5-8, 13-15, 18, 20, 23-24, 26-29,

33-35, 40; TM Frank Bates 17-18, 26-32). His brother stated he saw Bates staggering at the time of his arrest (TM Frank Bates 30) and further described his brother's condition in the interrogation room as follows:

> ". . .his face was red. It looked to me like he was trembling, and his eyes were real fiery [sic]; and I asked him if he was all right. He said '. . .Hell No, I'm not all right.'" (TM Frank Bates 11).

It was an individual of this mental and physical condition who was taken to the office of the homicide squad, placed in a windowless interrogation room, and questioned for almost three and one-half hours.

Bates testified that prior to his confession he said, "I ain't going to say no more. I want to see a lawyer right now," and was told by one of the officers that it was a "bad time of the day to get a lawyer." (TM Bates 13, 14, 20).

Frank Bates was able to corroborate this exchange because he overheard it. (TM Frank Bates 33). The officers left but came back within an hour and resumed the interrogation. (TM Bates 14-18). At another time during the interrogation Bates requested a lawyer and was told he did not need one. (TM Bates 27, 28.) There was no evidence contradicting this evidence concerning the request and denial of counsel and the continued interrogation after requests for counsel and to remain silent.

According to Bates, the police told him that if he cooperated he would only be charged with manslaughter. Frank

Bates not only overheard this promise, but also was told by the police that if Bates confessed, Bates would only be charged with manslaughter. (TM Bates 18-25; TM Frank Bates 12-24, 34-36).

The police required Bates' brother's presence. They told Bates that his brother had said that he, Bates, had committed the crime. According to Frank Bates, he had not said this. (TM Frank Bates 8-9, 11, 23-25.)

Frank Bates also overheard his brother yelling during the interrogation, "You aren't going to trick me into a confession." (TM Frank Bates 15.)

Although Bates signed the waiver of constitutional rights form, he denies having read it. (TM Bates 26.) He also said that portions of his confession consisted of information provided him by the police. (TM Bates 35.)

The officers stated that they did not believe that Bates appeared to be under the influence of drugs or alcohol (TM Drescher 132-133; TM Burgess 166-67.) One officer denied discussing manslaughter with Bates; yet, the officer admitted he told Bates he would not be charged with first degree murder, but rather would be charged with "aggravated murder". Bates incorrectly thought there was a difference between these charges because he said "Well, that's alright". The officer did not correct Bates' misapprehension. (TM Drescher 133-37, 149-51.) Another officer conceded he had discussed manslaughter with Bates and Bates' brother, although he claimed it was in the context of setting forth the possible charges. (TM Burgess 180-82.) One officer admitted that during the interrogation Bates did not want to respond to the charges. Nevertheless, the interrogation

apparently continued. (TM Burgess 176.) The officers did not rebut the testimony that Bates' request for counsel was denied and that Bates initially said he did not wish to talk. The officers did say to Bates that he would feel better and relieved if he got the matter off his chest. (TM Drescher 153.) There is no indication as to why Bates was not brought before a magistrate before the lengthy interrogation.

One officer admitted that after the interrogation Bates "was in a right mental state at that time for a recorded statement to be taken". (TM Drescher 153.)

Petitioner sought to suppress his confession at a pretrail hearing on the grounds that it was involuntary and that he had not waived his constitutional rights. (Motion to Suppress Statements and Physical Evidence.) The triál court concluded ". . .it's the finding of the Court [that the recorded confession] was given voluntarily and freely, and after having been properly advised of his rights pursuant to law. . ." (TM 198.) Despite the evidence in the record, the trial judge did not address himself to the denial of the request for counsel or to the resumption of the interrogation after Bates had elected to remain silent. The Ohio Supreme Court, without discussing Bates' request for counsel and to remain silent, simply concluded that Bates "knowingly, voluntarily and intelligently waived his constitutional rights." 358 N.E. 2d at 588.

1. The Confession Was Obtained After Petitioner Requested And Was Denied Counsel.

Both Bates and his brother testified that during the interrogation Bates requested counsel on several occasions and

the police in effect denied and ignored his request and continued the interrogation that led to the recorded confession. This testimony was not contradicted. Accordingly, Bates' confession should have been excluded. Miranda v. Arizona, 384 U.S. 436 (1966); Escobido v. Illinois, 378 U.S. 478 (1964).

As the court stated in Miranda, "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474. In Michigan v. Mosley, 423 U.S. 96 (1975), the Court suggested that the Miranda opinion does not create a per se proscription of any further interrogation once the person being questioned has indicated a desire to remain silent. Mosley, however, does not suggest that once the person being questioned has asked for any attorney, the interrogation may continue. On the contrary, the Court in Mosley specifically distinguished between a request to remain silent and a request for an attorney by pointing to the clear language of Miranda requiring that the interrogation cease upon a request for counsel. 423 U.S. at 102 n. 7; 104 n. 10.

As the court in United States v. Massey, 550 F.2d 300, 307-08 (5th Cir. 1977) said, in holding a confession inadmissible after interrogation continued when a request for an attorney was ignored, "...a valid waiver will not be presumed simply from the fact that a confession was in fact eventually obtained, Miranda, 384 U.S. at 475, 86 S.Ct. 1602, or that a waiver was eventually signed."

Despite the seemingly clear language of the Supreme Court and the holdings of many courts that there can be no

interrogation after a request for counsel,[11] there are apparent contradictions in the lower courts as to whether there can be a waiver after a request for counsel;[12] and the Ohio Supreme Court totally ignored the issue upon a finding of voluntariness.

In view of what appears to be a clear deprivation of defendant's constitutional rights and some confusion in the lower courts, the Court should grant the petition.

2. The Confession Was Obtained After Petitioner Indicated That He Desired To Remain Silent.

Prior to the confession, it is uncontradicted that Bates stated that he did not wish to speak and wanted an attorney and that these requests were ignored. In Michigan v. Mosley, supra, 423 U.S. 96, the Court held that after a defendant said he did not wish to speak, the police could resume questioning under certain circumstances. In that case, the court approved the resumption of questioning when it occurred, after a "significant period of time" and after the provision of a fresh set of warnings,

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11/ E.g. United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969) ("Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible.") See also United States v. Kinsman, 540 F.2d 1017, 1019 at n. 1 (9th Cir. 1976) ("As we interpret the plain language of Miranda, the words 'the interrogation must cease' if the individual in custody asks for an attorney, means exactly what it says." "Further, Mosley never asked for an attorney."); United States v. Massey, 550 F.2d 300, 307 (5th Cir. 1977); United States v. Womack, 542 F.2d 1047, 1050 (9th Cir. 1976); People v. Superior Court, 15 Cal. 3d 729, 125 Cal. Rptr. 798, 542 P.2d 1390 (1975); see United States v. Cookston, 379 F. Supp. 487 (W.D. Tex. 1974).

12/ Compare United States v. Phaester, 544 F.2d 353, 367 (9th Cir. 1976). ("We concluded that a waiver of rights under Miranda can occur despite an earlier demand to have an attorney.") with United States v. Priest, supra, 409 F.2d 491.

and when it was limited to a subject that had not been covered in the earlier interrogation. 423 U.S. at 106. Under those facts the Court held that defendant's "'right to cut off questioning' was fully respected. . ." Id. at 104.[13/]

In the instant case, however, after the request to remain silent, the delay in interrogation was only an hour, there is no evidence of a repeated warning and the subject matter of the interrogation was basically the same throughout. (TM Bates 15-18). The facts demonstrate that this is a case "where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." Michigan v. Mosley, supra 423 U.S. at 105-06.

Again, despite the facts in the record, the Ohio Supreme Court ignored the issue and simply made a finding of voluntariness. This Court should grant the petition to determine whether the continued interrogation constituted a constitutional violation.

3. The Circumstances Demonstrate That Petitioner Did Not Knowingly and Intelligently Waive His Rights to Counsel And To Remain Silent And That The Confession Was Involuntary.

13/ Some courts have suggested that Mosley applies only to the "special circumstances" in that case. See United States v. Riggs, 537 F.2d 1219, 1222 (4th Cir. 1976); United States v. Clayton, 407 F. Supp. 204, 207 (E.D. Wis. 1976); United States v. Maddox, 413 F. Supp. 60, 65 (W.D. Okla. 1976).

The facts of this case makes it clear that the police utilized the "more sophisticated modes of 'persuasion'" upon this particularly vulnerable defendant. Blackburn v. Alabama, 361 U.S. 199, 206 (1960). The police not only used trickery, isolation, and overt or at least suggested promises of leniency to obtain a confession, but also refused petitioner's requests for counsel and to remain silent.[14/]

It is inconceivable that there could be any finding that petitioner waived his rights to counsel and to remain silent, especially since courts should "indulge in every reasonable presumption against a waiver. . . ." Brewer v. Williams, ___ U.S. ___, 97 S.Ct. 1232, 1242 (1977). In fact, the trial court never made an express finding that petitioner had knowingly and intelligently waived his rights to counsel and to remain silent. The failure to make such a finding constitutes error. See Miranda v. Arizona, 384 U.S. 474 (1966); cf. Sims v. Georgia, 385 U.S. 538 (1967); United States v. Goss, 484 F.2d 434 (6th Cir. 1973).

Petitioner raised the issue as to whether, in view of his mental condition (not only mental capacity, but effects of drugs and alcohol) at the time of interrogation, he could provide a voluntary confession and knowingly and intelligently waive his constitutional rights. See Blackburn v. Alabama, 361 U.S. 199, 211, (1960); Westbrook v. Arizona, 384 U.S. 150, (1966); Pate v. Robinson, 383 U.S. 375 (1966); United States v. Silva, 418 F.2d 328, 331 (2d Cir. 1969).

14/ As a result of the denial of counsel, the confession "must be presumed a product of compulsion, subtle or otherwise." United States v. Priest, 405 F.2d 491, 493 (5th Cir. 1969).

Once the mental condition of defendant becomes a factor, the trial judge not only has to have a hearing on the matter, but should hold a hearing sua sponte, even if one is not requested. United States v. Silva, supra, 418 F.2d at 331. In the instant case, despite evidence of Bates' mental incapacity and the effects of drugs and alcohol at the interrogation, no psychiatric testimony was received and no expert testimony was presented by the prosecution in connection with the ability of Bates to waive his constitutional rights and provide a voluntary confession.

Moreover, the evidence suggests that the police did discuss a lower sentence in return for a confession. Both Bates and his brother testified that such a promise was made. The officers, while denying that an overt promise was made, admitted they discussed the lesser sentence with Bates. An officer admitted that Bates seemed satisfied that he would be charged with aggravated murder instead of first degree murder (the officer did not advise Bates of the latter's obvious misapprehension that the two were different). Surely, in view of the admitted discussion of lesser offenses, there had to have been at least a "'slight,'" "'implied'" promise, which would render the confession involuntary. Brady v. United States, 397 U.S. 742, 753 (1970).

In view of the fact that Bates, with an admittedly low I.Q., was placed in a room, unrepresented by counsel, interrogated for several hours by a number of police, with the police using his brother and discussing alternative sentences, it is no wonder that the officer said that Bates "was in a right mental state at

that time for a recorded statement to be taken." Under these circumstances, the government did not meet its "heavy burden" to establish that petitioner knowingly and intelligently waived his rights to an attorney and to remain silent, (Miranda v. Arizona, supra, 384 U.S. at 475,) and its burden to show that the confession was voluntary. Lego v. Twomey, 404 U.S. 477 (1972).

If lower courts are going to find confessions admissible under these facts in death penalty cases, then the Supreme Court should grant the petition to establish firmer guidelines in connection with the admissibility of confessions.

4. The Erroneous Admission of The Confession Was Prejudicial Even Though Petitioner's Testimony Reiterated Much of The Content of His Confession Since There Was No Showing That His Testimony Was Not Impelled By His Extrajudicial Confession.

The Ohio Supreme Court suggested that because a witness identified Bates [15/] and because Bates testified and related essentially the same facts as stated in the confession, Bates was "not compelled to waive his constitutional right against self-incrimination" and the denial of the motion to suppress was not error. 48 Ohio St. 2d 315, 358 N.E. 2d 584, 588.

It is, of course, ". . .axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction

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15/ The identification was certainly suspect. See Supra at p. 6 n. 1.

is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession [citation], and even though there is ample evidence aside from the confession to support the conviction." Jackson v. Denno, 378 U.S. 368, 376-377 (1964).

Although Bates did testify at trial as to many of the facts set forth in his confession,[16/] that testimony followed the ruling by the court that the confession would be admitted and the admission of the confession. There is no showing that defendant would have testified had his confession been excluded. The Ohio Supreme Court seems to suggest that a defendant must establish that the testimony was induced by the confession. Unlike the situation where a guilty plea precedes any determination of the admissibility of the confession (McMann v. Richardson, 397 U.S. 759 (1970), here the recorded confession had already been admitted into evidence. Petitioner was thus faced with the choice of not testifying and hoping for a reversal based upon the erroneous admission of the confession or testifying in order to deal with the recorded confession. Clearly, the decision to testify must have been based on the fact that the confession had been admitted.

The California Supreme Court has "squarely held that in such a situation the record of the case must 'dispel beyond a reasonable doubt the possibility that the defendant took the stand in an attempt to mitigate the explosive impact' of constitutionally inadmissible evidence. (People v. Spencer (1967), 66 Cal. 2d 158, 169 [57 Cal. Rptr. 163, 424 P.2d 715]." People v.

16/ The confession was, however, utilized to impeach Bates during the cross examination. (TP 313-318.)

Leach, 15 Cal. 3d 419, 447 n. 19, 124 Cal. Rptr. 752, 541 P.2d 296 (1975).[17/]

This Court should grant the petition to determine whether the testimony of a defendant, without more, automatically renders the improper admission of a confession harmless beyond a reasonable doubt as seemingly suggested by the Ohio Supreme Court.

17/ Milton v. Wainwright, 407 U.S. 371 (1972), held error harmless when there was substantial overwhelming evidence of guilt, but did not consider the issue of whether a testimonial confession was induced by the improper admission of a confession. The situation involving multiple confessions before the admission of one of them in evidence is also distinguishable. Samora v. United States, 406 F.2d 1095, 1900 n. 9 (5th Cir. 1969). Moreover, in the instant case, the confession contained damaging material that was before the court in the mitigation hearing.

VII CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the judgment of the Supreme Court of Ohio.

Dated: May 18, 1977

Respectfully submitted,

RICHARD M. MOSK
MARILYN EPSTEIN LEVINE
1800 Century Park East
Los Angeles, California 90067

JACK GREENBERG
JAMES M. NABRIT, III
PEGGY C. DAVIS
JOEL BERGER
DAVID E. KENDALL
10 Columbus Circle, Suite 2030
New York, New York 10019

ANTHONY G. ARMSTERDAM
Stanford University Law School
Stanford, California 94305

By Richard M Mosk
Richard M. Mosk
ATTORNEYS FOR PETITIONER

48 Ohio St.2d 315

The STATE of Ohio, Appellee,

v.

BATES, Appellant.

No. 76-904.

Supreme Court of Ohio.

Dec. 23, 1976.

Defendant was convicted in the Court of Common Pleas of murder while attempting to commit aggravated robbery and attempted aggravated robbery and defendant was sentenced to death on the murder

count. The Court of Appeals, Hamilton County, affirmed. On appeal as of right, the Supreme Court held that the record sufficiently established that defendant had knowingly, voluntarily and intelligently waived his constitutional rights before he gave a statement to police; that the trial court correctly admitted cardboard targets which had been used by police to conduct tests for the purpose of establishing the distance between the shotgun barrel and the victim at the time of the fatal shooting; that the trial court's instructions on the element of purpose required for an aggravated murder conviction were correct; and that evidence failed to establish mitigating circumstances.

Judgment of the Court of Appeals affirmed.

1. Criminal Law ⇐414

Evidence that, inter alia, defendant was advised of his rights three times before he gave police recorded statement describing his role in an attempted armed robbery and homicide and that defendant was neither drunk nor under the influence of drugs when he signed standard police notification of rights form sufficiently established that defendant knowingly and voluntarily waived his constitutional rights and that his subsequent statement was admissible in prosecution for murder and attempted aggravated armed robbery. U.S.C.A.Const. Amends. 5, 6; R.C. §§ 2903.01, 2911.01, 2923.02.

2. Criminal Law ⇐404(4)

In view of fact that gun experiments were conducted and exhibits with reference thereto introduced to demonstrate the spread, not the penetration, of shotgun pellets, and that spread of pellets was relevant to question of distance between weapon and victim and thus to whether shooting was purposeful or accidental, cardboard targets used to conduct tests of murder weapon were relevant and admissible in murder prosecution, despite contention that targets provided different amount of resistance to shotgun blasts than did victim's body and so did not recreate conditions of homicide.

3. Criminal Law ⇐741(1)

In prosecution for aggravated murder and attempted aggravated armed robbery, it was for jury to decide what weight to accord to evidence concerning experiments which State conducted to establish distance between weapon and victim at time fatal shot was fired.

4. Criminal Law ⇐829(4)

Where trial court, in prosecution for aggravated murder and attempted aggravated armed robbery, instructed jury that it could find defendant guilty of aggravated murder only if it found that killing was done purposely and told jury that "To do an act purposely is to do it intentionally and not accidentally" and where instructions were such that jury could have found that accident occurred, no error resulted from trial court's refusal to give standard instruction on accident. R.C. §§ 2903.01, 2923.02.

5. Homicide ⇐354

Evidence presented at mitigation hearing which included psychiatric and presentence probation reports sufficiently supported trial court's finding that there were no mitigating circumstances relative to penalty to be imposed for offense of aggravated murder. R.C. § 2929.03(E).

On January 24, 1975, the Hamilton County grand jury returned a two-count indictment, with a specification. The first count charged Leroy Bates and Ellis Shelton with purposely causing the death of Lloyd Adkins while attempting to commit aggravated robbery in violation of R.C. 2903.01.

The specification to the first count stated that the offense contained in the first count was committed while Bates and Shelton were attempting to commit aggravated robbery.

The second count charged the pair with attempted aggravated robbery, as defined by R.C. 2911.01 and in violation of R.C. 2923.02.

In a separate trial, Bates was found guilty on each count and the specification.

Following a psychiatric examination and a presentence probation report, a mitigation hearing was conducted. The court found an absence of any mitigating factors, and, on July 1, 1975, Bates was sentenced to death on the first count and the specification thereto. On the second count, he received a sentence for a term of years.

The Court of Appeals affirmed the conviction and sentence.

The cause is now before this court upon an appeal as of right.

Simon L. Leis, Jr., Pros. Atty., Robert R. Hastings, Jr., and Thomas P. Longano, Cincinnati, for appellee.

Latimer & Swing Co., L. P. A., Albert J. Mestemaker, Schwartz & Schwartz and Michael S. Schwartz, Cincinnati, for appellant.

PER CURIAM.

I.

The record before us establishes the following facts:

On November 25, 1974, the defendant-appellant, Leroy Bates, was living at his sister's residence located at 2248 Wheeler Street, in Cincinnati. Ellis Shelton, a friend of Leroy Bates for about six years, stopped by the Wheeler Street address to see Bates that afternoon.

Shelton explained to Bates that he was planning an armed robbery of the Warner Tavern and that it would be necessary for him to have a gun. Shelton also informed Bates that when he pulled the robbery off he would have the gun with him; that he would have ammunition for the gun; and that it would be loaded.

Shelton asked Bates if he knew of anyone who had a gun and, if so, could he obtain it. Bates told Shelton that he knew of an individual who had guns and that he could get a gun for Shelton. He then telephoned a friend by the name of Kenneth Carter. From past experience he knew that Carter had access to firearms. Bates asked Carter to loan him a gun, but Carter refused and said that he was willing to sell him one for $20. Bates agreed to this purchase price.

During their discussion, Shelton told Bates that he would need help and assistance in executing the robbery. When asked if he would assist Shelton in the robbery, Bates agreed.

Later that day, in the early evening, Kenneth Carter arrived at the Wheeler Street address carrying a sawed-off, 12-gauge shotgun. Shelton met Carter on the street in front of Bates' sister's home where Carter handed the gun to Shelton, who, in turn, handed $13 to Carter. The balance of $7 was to be paid to Carter at a later time. Shelton was also given three or four shotgun shells with number 5 or 6 size shot.

Shelton departed after the transaction with Carter and subsequently returned in the late evening hours of the same day. Shelton and Bates then left the Wheeler Street address together and headed for a wooded hillside known as "TV Hill," located in the Wheeler Street area, the property of WCET television studios.

When the two men arrived at the hill, Shelton removed the unassembled shotgun from a bag. The weapon, in three pieces, was then assembled by Shelton. Appellant observed Shelton assembling the weapon and also saw that Shelton was in possession of several shotgun shells for the weapon. Both men then put stocking masks over their heads before they proceeded to the bar. Bates' role in the robbery was to go behind the bar and take the money while Shelton held the shotgun on the patrons. The expected take in the robbery was to be about $200.

They departed "TV Hill" together, headed for the Warner Tavern located at 303 Warner Street. Upon their arrival both men looked into the tavern and observed three people sitting in the bar.

Bates and Shelton then entered the tavern with the former leading the way. The time was approximately midnight or shortly thereafter. Lois Wells was tending bar and standing next to the cash register. Robert Schultheis was seated at the bar located in the rear part of the barroom. Lloyd Ad-

kins, an off-duty Pinkerton guard, was seated at the bar next to the front entrance. Adkins and Schultheis were approximately 15 to 18 feet apart.

Lois Wells asked the masked men what they wanted. Shelton remained by the front door and Bates moved to the rear area of the bar. The opening to the rear of the bar was located next to where Schultheis was sitting. After Lois Wells inquired as to the nature of their business, Shelton raised the shotgun over the bar aiming directly at her. Wells then stated, "All right, I know what you want."

When Bates started to move around to her side of the bar, it was Wells' intention to let him take the money. As Lois Wells moved to the rear of the bar, she heard Adkins say to Shelton, "Oh, no you don't!" She then turned and looked toward the front of the tavern, where Shelton and Adkins were struggling. Wells heard Shelton shout at Adkins to get back or he would be killed. Wells then observed Shelton push Adkins off balance. Shelton then stepped back and fired the fatal shot directly at Adkins from a distance of several feet.

Meanwhile, Bates engaged Schultheis in a fight and struck him. As a result, Schultheis was knocked to the floor and kicked by Bates. Schultheis then managed to get off the floor and move to a back room and hide $280 that he had on his person.

Lois Wells identified Bates, at the trial, as the man who entered the tavern first and subsequently struck Schultheis.

After the shooting, Bates and Shelton fled the tavern on foot. They went back to "TV Hill" and stripped the stocking masks from their heads and threw them away. The shotgun was then disassembled, and the two returned to 2248 Wheeler Street.

At approximately 1:30 a. m., on November 26, 1974, Kenneth Carter received a telephone call from Bates asking Carter to pick up the shotgun that Shelton had used to murder Adkins. Carter did not reclaim the gun as the appellant had requested.

Carter saw the appellant, at approximately 2:00 p. m., on November 26, 1974, and appellant again told Carter of the events of the preceding evening, including the shooting.

Carter testified at trial that the gun was capable of firing. He also testified that the weapon had to be cocked before it could be fired. The shotgun was identified at trial.

Bates hid the gun in the backyard of his sister's residence and kept it there for about two days. Then he took the gun, wrapped in a towel and secured with a string, to a wooded area in Mt. Airy Forest near Kirby Road where he threw the shotgun away.

On December 12, 1974, Bates was placed under arrest. He was repeatedly advised of his constitutional rights and signed a waiver of his rights. The appellant then freely told police of his involvement in the robbery attempt and murder which occurred at the Warner Tavern.

The coroner testified that the cause of death was hemorrhage as a result of a gunshot wound of the chest.

II.

[1] Appellant advances four propositions of law, the first of which asserts that:

"The court erred to the prejudice of defendant-appellant in denying his motion to suppress his statement made to law enforcement officers in violation of his rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States of America."

The record indicates that Bates was arrested at his sister's home at about 3:00 p. m. on December 12, 1974, and apprised of what the police wished to talk to him about. According to Officer Burgess' testimony, his speech was clear and his appearance normal, and he was neither drunk nor under the influence of drugs. They arrived at the homicide squad office at approximately 3:30 p. m. At that time, Officer Sefton advised him orally of his constitutional rights in an interrogation room. Next, defendant was informed that his brother, Frank, and Kenneth Carter had told police about his involvement in the attempted robbery and killing. He spoke to his brother,

who was brought to the interrogation room, and the latter denied saying anything to the police.

Officer Drescher then talked to the appellant after first advising him of his constitutional rights. They talked for an hour. Drescher testified that, based on the fact that he had talked to the appellant for over an hour and upon his prior police experience with persons under the influence of alcohol or drugs, it was his opinion that Bates was not under the influence of an alcoholic beverage or a drug.

After talking with Drescher for an hour, Bates signed a standard police notification of rights form, which waiver set out his constitutional rights, and then gave Drescher a recorded statement. At the outset of the recorded statement, Bates was again advised that:

(1) He had the right to remain silent;

(2) anything he said could be used against him in court;

(3) he had the right to talk to counsel before any questioning;

(4) he had a right to have an attorney with him when he answered questions;

(5) if he could not afford an attorney, one would be appointed for him; and

(6) if he started to answer questions, he still had the right to stop answering questions at any time.

In the course of the interrogation, Officer Burgess asked specifically whether Bates had been drinking or was under the influence of any drugs, and he stated he was not.

Thus, the record discloses beyond peradventure that the appellant knowingly, voluntarily and intelligently waived his constitutional rights. There is nothing in the record to indicate that Bates misapprehended his rights as was the case in *State v. Jones* (1974), 37 Ohio St.2d 21, 306 N.E.2d 409, and *State v. Parker* (1975), 44 Ohio St.2d 172, 339 N.E.2d 648. He was advised of his rights three times: Once by Officer Sefton; once by Officer Drescher; and once in the waiver of rights form at the outset of the recorded statement. He signed the waiver of rights form.

It must also be noted that the state produced an eyewitness, Lois Wells, who identified Bates as one of the two men who attempted to commit aggravated robbery at the Warner Tavern on November 26, 1974, shortly after midnight.

Bates testified in his own behalf and related to the jury essentially the same story he related in the recorded statement. It is not urged by appellant that the introduction of the recorded statement required him to take the witness stand. Thus, he was not compelled to waive his constitutional right against self-incrimination.

For these reasons, in our judgment, the trial court did not err in overruling appellant's motion to suppress his recorded statement, and his proposition of law No. 1 is rejected.

III.

[2] For his second proposition of law, appellant claims that:

"The trial court erred to the prejudice of defendant-appellant when it overruled his objection to the receipt in evidence of state's exhibits seventeen and eighteen."

State's exhibit Nos. 17 and 18 are two cardboard targets used to conduct certain tests by police officers for the purpose of establishing the distance between the shotgun barrel and the victim, Adkins. This question of distance was relevant to the issue of whether the shooting was purposeful or accidental. The state's witness referred to the exhibits in offering his opinion that the fatal shot was fired at the decedent from approximately four to five feet away, a conclusion tending to negate appellant's position that the shotgun was fired accidentally in the course of a physical struggle over its possession.

The basis for the objection to the exhibits below and the challenge to their admission at the appellate level is that there was no showing that firing the shotgun at exhibit Nos. 17 and 18 recreated a condition substantially similar to the conditions existing

at the time of the homicide. More specifically, appellant contends that the cardboard targets provided a different amount of resistance to the shotgun blasts than did Adkins' body, because Adkins wore a number of items of clothing and had a pack of cigarettes in his breast pocket.

A reading of the record reveals that the obvious purpose for which the gun experiments were conducted, and the exhibits with reference thereto introduced, was to demonstrate the *spread*, not penetration of the shotgun pellets. Evidence of the extent of spread was offered in proof of distance between weapon and victim. With this purpose in mind, any arguable differences between the experiments and the actual conditions as they existed when Adkins was shot, with respect to his clothing and the cigarette package, would be irrelevant to the question of the admissibility of exhibit Nos. 17 and 18.

There was no evidence at the trial that the use of the cardboard did, in fact, create substantially different conditions than those existing at the scene of the homicide. As stated in 21 Ohio Jurisprudence 2d 546, Evidence, Section 522, "* * * the questions of admissibility as affected by dissimilarity of conditions is essentially a matter within the discretion of the trial court."

[3] We find no abuse of discretion in the trial court's ruling on this matter. What weight to grant the evidence, of course, rested with the jury. Proposition of law No. 2 is not accepted.

IV.

[4] Appellant contends in his third proposition of law that:

The trial court erred to the prejudice of defendant-appellant when it refused to give the standard instruction on accident to the jury."

The record demonstrates the jury was instructed that before it could find Bates guilty of aggravated murder while attempting to commit aggravated robbery, it had to find, among other things, that the killing of Lloyd Adkins was done purposely.

The trial court also instructed the jury as follows:

"Purpose to kill is an essential element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to kill. A person acts purposely when the gist of the offense is a prohibition against conduct of a certain nature regardless of what the offender intends to accomplish; thereby it is his specific intention to engage in conduct of that nature. Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. *To do an act purposely is to do it intentionally and not accidentally.* Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct. The purpose with which a person does an act is determined by the manner in which it was done, the means or weapon used, and all the other facts and circumstances in evidence. If a wonnd [*sic*] is inflicted by a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill may be inferred from the use of the weapon." (Emphasis added.)

The court also instructed the jury on lesser included offenses of manslaughter and involuntary manslaughter:

"The crime of manslaughter is distinguished from aggravated murder by the absence or failure to prove purpose to kill."

As pointed out by the Court of Appeals in its opinion, the trial judge gave an impeccable charge which included the possibility of a finding by the jury of accident, thereby barring a conviction of aggravated murder.

The charge as given was correct; appellant's proposition of law is incorrect and is not accepted.

V.

[5] It is urged in appellant's fourth proposition of law that:

"The trial court erred as a matter of law when it failed to find the existence of one or more mitigating circumstances on behalf of defendant-appellant relative to the penalty to be imposed for the offense of aggravated murder."

R.C. 2929.03(E) provides that:

"Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender."

The mitigation hearing in this cause was heard on the 30th day of June, 1975, before Judge William S. Mathews, Court of Common Pleas of Hamilton County, Ohio. The report of Dr. Hamilton was stipulated as was the report of Dr. McDevitt and Dr. Weaver, except for the final two paragraphs of the latter report. In addition, the probation report was stipulated. The appellant and his mother also testified at the mitigation hearing.

At the conclusion of the hearing, the court ruled that the evidence failed to show by a preponderance that:

(1) The victim of the offense induced or facilitated it;

(2) it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; or

(3) the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

In the face of the record, this ruling of the trial court and its affirmance by the Court of Appeals is totally justified.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

C. WILLIAM O'NEILL, C. J., and HERBERT, J. J. P. CORRIGAN, STERN, CELEBREZZE, WILLIAM B. BROWN and PAUL W. BROWN, JJ., concur.

APPENDIX II, the opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio was not of reproducible quality.

APPENDIX III

STATUTORY PROVISIONS INVOLVED

Ohio Revised Code §2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Revised Code §2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

Ohio Revised Code §2929.02 Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

Ohio Revised Code §2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Ohio Revised Code §2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt,

the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. A-739

LEROY BATES, Petitioner

v.

STATE OF OHIO, Respondent

CERTIFICATE OF SERVICE

RICHARD M. MOSK, a member of the Bar of this Court, certifies that pursuant to Rule 33 he served the within Motion for Leave to Proceed in Forma Pauperis and the Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio on the counsel for respondent by enclosing a copy thereof in an envelope, airmail postage prepaid addressed to:

Simon L. Leis, Jr.
Robert R. Hastings, Jr.
Thomas P. Longano
420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202
Attorneys for Plaintiff State of Ohio

Attorney General
State of Ohio
30 E. Broad
Columbus, Ohio

and depositing the same in the United States mails at Los Angeles, California, on May 18, 1977, and further certifies that all parties required to be served have been served.

Richard M. Mosk
Counsel for Petitioner